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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 902

DON O. FEAK, *et al.*,
Petitioners,

v.

CITY OF TOLEDO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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CITY OF TOLEDO, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

Don O. Feak and others pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on December 18, 1957, which affirmed a certain judgment entered by the Court of Appeals for Lucas County, Ohio.

OPINION BELOW.

The Supreme Court of Ohio did not render any opinion. The opinions of the trial court and Court of Appeals are set forth in the appendix. These opinions have not been officially reported.

JURISDICTION.

The judgment of the Supreme Court was entered on December 18, 1957, and an application for rehearing was filed on January 2, 1958, and denied on January 15, 1958.

The judgment of the Supreme Court appears in the appendix. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3), on the ground that a final judgment of the Supreme Court of Ohio has upheld the validity of an ordinance of the City of Toledo against the claim of petitioners that the ordinance is repugnant to the Fourteenth Amendment to the Constitution.

QUESTIONS PRESENTED.

1. Does the Toledo Ordinance violate due process of law guaranteed by the Fourteenth Amendment in that it establishes a conclusive presumption that a pinball machine which can possibly be used for gambling purposes is in fact used for such purposes?

2. Does the City of Toledo violate due process of law guaranteed by the Fourteenth Amendment in prohibiting the use, ownership or exhibition of pinball machines without regard to the question of whether they are used for gambling?

STATUTES INVOLVED.

Amendment XIV, Constitution of the United States.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 25-9-1, Article IX, Chapter 25, Municipal Code of Toledo, Ohio.

April 9, 1956.

"(a) It is hereby declared prejudicial to public morals and contrary to the public welfare, and is hereby made unlawful, to own, possess, exhibit, operate or permit the operation or exhibition of any pinball machine or any manually or coin or disc operated amusement device, of whatever kind or description, or by whatever name known or commonly referred to, which is so constructed as to make possible either directly or indirectly by the use of an adjustment, or by the registering of odds or a score, the return, or entitle one to the return of cash, tickets, discs, tokens, free-plays, certificates or other privileges, whether such ticket, disc, token, free-play, certificate or other privilege has a value or not.

"(b) Any pinball machine or similar device described in Section 25-9-1 is hereby declared a nuisance and shall be subject to seizure by any police officer and may be destroyed by order of the Chief of Police as in the case of gambling devices. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance, to dispose of same.

"(c) Whoever owns, possesses, exhibits, operates or permits the exhibition or operation of such machine shall, upon conviction, be fined not less than $50.00 nor more than $200.00, or be imprisoned not more than six months, or both. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance, to dispose of same."

STATEMENT.

On July 9, 1936, the Council of the City of Toledo, Ohio, passed an ordinance licensing so-called pinball machines. The licensing ordinance was amended from time to time, and in the period July 6, 1936, to April 9, 1956, the petitioners herein purchased pinball machines in which they have a large investment, and entered into contracts with merchants for the exhibition of these so-called pinball machines on the basis of an agreed upon division of profits. These machines are used for amusement only, and not for gambling purposes. On April 9, 1956, the Council of the City of Toledo, Lucas County, Ohio, adopted Ordinance 167-56, repealing Section 25-9-1, Article IX, Chapter 25, and enacted a new Section 25-9-1, Article IX, Chapter 25, Municipal Code of the City of Toledo, Lucas County, Ohio, effective July 1, 1956.

On July 18, 1956, the petitioners, as owners of a number of pinball machines, filed their second amended petition in the Court of Common Pleas of Lucas County, Ohio, requesting that the Court enjoin the City of Toledo from seizing specified pinball machines pursuant to Section 25-9-1 of the Municipal Code. The petitioners claimed, among other grounds, that the enforcement of the ordinance would violate their rights under the Fourteenth Amendment to the Constitution of the United States.

After an extensive trial in which petitioners introduced evidence showing that the machines in question could not be used for free-plays without extensive adjustments by a skilled mechanic, the trial court ruled that the ownership of the machines in question was not in violation of Section 25-9-1, since there was no showing that the machines in question had been used for gambling purposes.

Respondents appealed to the Court of Appeals of Lucas County, Ohio, and that court reversed the trial court, holding that it was immaterial whether the machines had been used for gambling purposes, since there was a possibility that the machines could be adjusted so as to permit the use of the machines for gambling purposes.

Petitioners filed an appeal with the Supreme Court of Ohio, claiming among other grounds that their rights under the Constitution of the United States were violated. The Supreme Court of Ohio dismissed the appeal as of right and overruled the alternate motion of petitioners to certify the record, and denied a petition for rehearing. The Supreme Court of Ohio did not write an opinion.

The appendix contains an excerpt from the Amended Complaint showing the claim that the ordinance violated the Constitution, and the text of Assignment of Error No. 18 in the Supreme Court of Ohio. Petitioners did not present the constitutional question in the Court of Appeals because the trial court decided the case in favor of the petitioners without relying on the constitutional ground.

Reference should also be made to a related case which is now pending before this Court. In *Benjamin vs. City of Columbus*, 167 Ohio St., 103, decided on December 18, 1957, the Supreme Court of Ohio upheld the validity of a somewhat similar ordinance enacted by the City of Columbus. The Columbus ordinance made it illegal to own, exhibit or permit the operation of any pinball machine regardless of whether the machine could be adjusted so as to permit its use for gambling purposes. The plaintiffs in that case have also filed a petition for certiorari with this Court on the ground that the judgment

of the Supreme Court of Ohio violated their rights under the Fourteenth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT.

This case presents two important constitutional questions. The first question is whether the ordinance in question violates due process as consistently construed by this Court in establishing a conclusive presumption that a pinball machine that can possibly be adjusted so as to permit free-plays will in fact be used for gambling.

The second question is whether the ordinance can validly prohibit the use and ownership of pinball machines without regard to the question of whether they can be used for gambling. This issue has not been decided by this Court, but should be decided at this time to resolve the conflict of opinions on this issue in the state courts of last resort.

1. Section 25-9-1 makes it unlawful to own, exhibit or operate any pinball machine "which is so constructed as to make possible either directly or indirectly by the use of an adjustment, or by the registering of odds or a score, the return, or entitle one to the return of cash, tickets, discs, tokens, free-plays, certificates or other privileges."

As construed by the Court of Appeals of Lucas County, Section 25-9-1 prohibits the ownership or use of any pinball machine which can conceivably be used for gambling purposes. The trial court held that the evidence adduced showed that an adjustment to permit free-plays on the pinball machines in question could not be made except by a skilled mechanic and would take a long time. The Court of Appeals did not dispute this finding, but held that under its interpretation of the ordinance any possi-

bility that the machine could be adjusted so that it could be used for gambling purposes was sufficient. The presumption that the machine has been or will be used for gambling is conclusive, and may not be rebutted by any evidence whatsoever.

This Court has held on many occasions that the establishment of a presumption by statute is a violation of due process of law guaranteed by the Fourteenth Amendment if the presumption is not one which can reasonably be supported by actual evidence. In *Tot vs. United States*, 319 U. S. 463, this Court held that Section 2 (f) of the Federal Firearms Act was invalid under the due process clause because it provided that possession of a firearm or ammunition by a person who had been convicted of a crime of violence shall be "presumptive evidence" that the firearms or ammunition had been shipped in interstate commerce after the effective date of the Act.

The Court pointed out that there was no rational connection between possession of a firearm by the accused and shipment of the firearm in interstate commerce after July 30, 1938, the effective date of the Act, since the firearm might have been acquired from intrastate sources, or from outside the state prior to July 30, 1938. The Court noted eight of its previous decisions which had held statutory presumptions to be invalid, and stated the rule as follows (p. 467):

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take

> in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

The authority of this case has not been questioned, and is fully supported by the earlier cases cited, such as *Western & Atlantic R. Co. v. Henderson*, 279 U. S. 639, and *Morrison v. California*, 291 U. S. 82, where the Court held that presumptions provided by statute were unreasonable because not justified by experience. In the *Western & Atlantic* case, this Court held unconstitutional a statute providing that in the event of a railroad crossing accident the railroad was presumed to be negligent, and in the *Morrison* case this Court held unconstitutional a California statute which prohibited aliens ineligible for citizenship from cultivating farm land, and placed on the defendant the burden of proving that he was not an eligible alien. The doctrine in *Tot* has been approved by this Court in many cases. See: *Screws vs. United States*, 325 U. S. 91, 89 L. ed. 1495; *Bollenbach vs. United States*, 326 U. S. 607, 90 L. ed. 350; *Kotteakos vs. United States*, 328 U. S. 750, 90 L. ed. 1557; *Krulewitch vs. United States*, 336 U. S. 440, 93 L. ed. 790; *Morissette vs. United States*, 342 U. S. 246, 96 L. ed. 288.

As more fully discussed below, petitioners contend that it is a violation of due process of law to ban the ownership and operation of pinball machines regardless of whether they are used for gambling, and if this proposition is correct it also follows that pinball machines cannot be banned unless there is a reasonable showing that they have been used or will be used for gambling purposes.

The City of Toledo in enacting the ordinance recognized the fact that the use and ownership of pinball

machines could be made illegal only if they were used for gambling purposes and attempted to establish that a pinball machine was subject to seizure as a gambling device by making a conclusive presumption that a machine which could be used for gambling purposes would in fact be used for these purposes. Petitioners contend that such a conclusive presumption is not warranted since there is no rational connection between the fact that a pinball machine can be adjusted to permit free-plays, and the fact sought to be inferred that the pinball machine has been or will be used for gambling purposes. Under the decisions of this Court in *Tot vs. United States* and prior cases cited therein, their rights under the Fourteenth Amendment have been violated.

2. The second question presented in this petition for a writ of certiorari is whether the City of Toledo can properly ban any type of pinball machine regardless of whether it has been used for gambling or can reasonably be expected to be used for gambling.

In the case of *Benjamin vs. City of Columbus*, the Supreme Court of Ohio held that an ordinance of the City of Columbus which banned all pinball machines, regardless of whether they were used for gambling or could be used for gambling, did not violate the rights guaranteed by the Fourteenth Amendment.

This question has been considered by the courts of a large number of states and with different results. The courts in the states of Utah, Pennsylvania, Kansas, Illinois, Oklahoma, California, Minnesota and Missouri have all held in effect that a city may outlaw the ownership and operation of pinball machines only if the machines have been used for gambling purposes, and that it is a violation of due process of law to outlaw all pinball machines re-

gardless of w'ether they have in fact been used for such purposes. This same result has been reached in four decisions of the Court of Appeals. On the other hand, the Supreme Court of Ohio in the *Benjamin* case and the highest courts of Idaho, Vermont and Iowa have decided that pinball machines can properly be banned regardless of whether they are used for gambling.

We may summarize briefly the cases which have held that it is a violation of due process to ban any type of pinball machines without regard to whether they have been used for gambling purposes.

Mills Novelty Co. v. Farrell, 64 F. 2d 476 (C. C. A. 2d 1933, affirmed 3 F. Supp. 555), and held in effect that the "insubstantial amusement feature of the machine" in aid of the sale of mints was not "any valuable thing," under a Connecticut Statute, and observed that "one may not suppose that a person desiring to gamble would put up money in the hope of obtaining tokens which can be used only to produce insignificant humorous sayings." The amusement feature of the machine does not make the machine a gambling device.

Davies v. Mills Novelty Co., 70 F. 2d 424 (C. C. A. 8th, 1934), was concerned with a Nebraska Statute, prohibiting games of chance for "money or property" which the court construed to mean "money or other thing of value" and the court further held that mere amusement does not offer a sufficient incentive to gambling and that the machine "has no element of gain or loss, financial or otherwise."

Chicago Patent Corporation v. Genco, Inc., 124 F. 2d 725 (C. C. A. 7th 1941), was a patent infringement involving pinball machines, wherein defendant contended that the device was a gambling machine and beyond the protection of the patent laws. The court defined a gaming device as one played for "gain," the test being whether it was designed for play

for "money or property." Observing that "nothing of monetary value, nothing susceptible of purchase and sale passes to the successful player," the opinion concluded that the issuance of a patent creates a prima facie presumption of utility, and in the absence of any showing by defendant to overcome such presumption and in view of the findings of the trial court that the machine may be operated "without gain being a factor" and that it was capable of legitimate use, the court could not hold as a matter of law that it was inherently a gambling device.

Washington Coin Machine Ass'n. v. Callahan, 142 F. 2d 97 (C. A., D. C., 1944), involved the phrase "money or property" as used in the penal statutes of the District. On the basis of various cases, the court concluded that free games were not of tangible or material value.

Gayer v. Whelan, 138 P. 2d 763 (Cal. Dist. Ct. of App. 1943), cites cases to the effect that free plays are not of "material value," and concludes that intangibles are not contemplated by the particular statute which speaks of winning or losing "merchandise, money or articles of value, checks, or tokens, redeemable in, or exchangeable for money or any other thing of value."

Crystal Amusement Corp. v. Northrup, 118 A. 2d 467 (Conn. Com. Pl. 1956), the defendant attempted to obtain exoneration from payment for a free play pinball machine on the theory that the subject matter of the sale when put to use was illegal, the Court held that the possibility of obtaining a free play did not constitute gambling and under no theory could the machine in question be said to be a gambling machine.

People v. One Mechanical Device, 11 Ill. 2d 151, 142 N. E. 2d 98.

1. A coin-operated pinball machine which did not pay out money but only additional free games,

and which was so constructed as to make result of its operation dependent in part upon skill of player, was not a "gambling device" within forfeiture statute.

State v. Waite, 156 Kan. 143, 131 P. 2d 708 (1942), dealt with automatic award of free plays on a "pinball" machine under a statute prohibiting machines "designed for the purpose of playing any game of chance for money or property" and with which persons are induced or permitted "to bet or wager any money or other thing of value." The court noted that no "tangible" property was awarded, and rested its decision on whether such free plays constituted "property." It meticulously dissected the statutory definition of "personal property" as meaning "goods, chattels, effects, evidences of right in action, and all written instruments by which any pecuniary obligation, or any right or title to property, real or personal, shall be created, acknowledged, assigned, transferred, increased, defeated, discharged, or diminished," and concluded that "property" as there used meant tangible property—something that could be carried physically. The court therefore held that the award of free games was not gambling.

State of Kansas v. One Bally Coney Island No. 21011 Gaming Table, a Prohibited Gambling Device, 174 Kan. 757, 258 P. 2d 225 (1953), a particular "pinball" machine or device—described more fully in the opinion—in no case "pays" any money or tangible property. Upon deposit of a coin every player is enabled to play one round or game, with scores automatically registered. If certain scores are made the player is accorded the privilege of entertaining or amusing himself by playing additional games. Such additional games constitute the only thing which a player may win. *Held*, that the privilege of such additional entertainment is not "property" within the meaning of G. S. 1949, 21-915, and therefore the machine does not fall within the prohibition of that

statute and hence was not subject to seizure and destruction as a gambling device, under G. S. 1949, 21-925 (following State v. Waite, 156 Kan. 143, 131 P. 2d 708, 148 A. L. R. 874).

McNeice v. City of Minneapolis, 84 N. W. 2d 232.

7. Pinball machines which merely award free replay to players achieving a certain score are not "gambling devices," within statute defining such devices, provided that replays are not used as system of making payoffs in cash or merchandise.

State v. One "Jack and Jill" Pinball Machine, 224 S. W. 2d 854 (Mo. Ct. of App. 1949), sums up the conception that free games are not "money or property" with exhaustive annotations and analysis of the cases. A rather lengthy discussion of the basis of the court's conclusion that free games are not property may be summed up in the following paragraph from the opinion, at page 861:

> "Does the player receive anything of financial or economic value? Rather isn't this so-called recreation and amusement the antithesis of value? If one's time is worth anything, it is a loss instead of gain, a waste instead of reward. Hope of reward or gain, above the amount risked, is the lodestone of gambling. The fact that one has paid five cents for it does not conclusively fix that, or any other sum, as its value or any value at all."

See also *Masters v. Kansas City*, 294 S. W. 2d 366 (1956).

State v. Betti, 23 N. J. Misc. 169, 42 A. 2d 640 (N. J. Ct. of Quarter Sessions 1945), holds free games to be recreational or amusement value only and not within statute condemning plays for "money or other valuable thing."

Overby v. Oklahoma City, 46 Okla. Cr. 42, 287 P. 796 (Okla. Crim. 1930), holds that slugs good for free plays were not "something of value."

In re Wigton, 151 Pa. Super. 337, 30 A. 2d 352 (Pa. Super. 1943), involved the phrases "money or other property of value" as used in one statute and "money or other valuable thing" as used in another statute, and held that free games were neither "property of value" nor "other valuable thing." The decision concludes that something tangible like "money" is contemplated by the combination of such words.

Commonwealth v. Kling, 140 Pa. Super. 68, 13 A. 2d 104 (Pa. Super. 1940), citing Pennsylvania cases, holds that slugs good for replay have no "intrinsic" value contemplated by statutes as theretofore construed.

Stevenson, et al. v. Salt Lake City Corporation, et al., Supreme Court of the State of Utah, No. 8638. Opinion filed 11/5/57.

On November 15, 1956, the City of Salt Lake adopted an ordinance very similar to the Toledo Ordinance. The trial court granted an injunction restraining the City and its Chief of Police from enforcing the ordinance. The Supreme Court of Utah affirmed the trial court. In his concurring opinion, Justice Crockett said:

> "I concur but deem it advisable to make these observations. It is urged that these devices are so readily adaptable to gambling that they are subject to interdiction under the police power. It is undoubtedly true that they may be easily used for gambling, but the fact that the legislature has provided that they may be licensed, taxed, and regulated seems to indicate that the legislature did not regard them as evil per se. They, of course, can be used as games of skill and amusement only. They are only evil if put to an evil use, and unless some aspect of the devices themselves, or their manner of use, were regarded as in some way affecting the health, morals or welfare of the public, there would

be no foundation upon which to base their prohibition under the police power, and it would be doubtful whether the city, or the legislature itself, could prohibit them any more than they could prohibit bowling or pitching horseshoes, or almost any other game one might mention, most of which readily accommodate themselves to gambling by those so inclined."

Petitioners hasten to say that they concede the right of the State to regulate the operation of pinball machines. Petitioners object to their being banned and cite to the Court *Adams v. Tanner, etc.*, 244 U. S. 590, in which this Court declared unconstitutional a statute prohibiting employment agencies from charging fees. On pages 594 and 595 the Court said:

"Because abuses may, and probably do grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

CONCLUSION.

This is an important question of constitutional law and the courts of the different states are in conflict. As indicated by the amount of litigation concerning this is-

sue, the question is an important one which affects a large number of persons and a substantial amount of property. The question has never been presented to this Court, and should be decided at this time. Consequently, the Court should grant the petition for certiorari in this case and the *Benjamin* case and pass on the question.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO.

STAHL, *J.*:

This matter came on to be heard on the pleadings, the evidence, the arguments and the briefs of counsel.

The issues are: Are certain pinball machines violative of the ordinance of the City of Toledo, Ohio?

As the Court views it this is a case seeking a declaratory judgment, and the injunctive proceedings are merely ancillary.

The Court wishes to compliment counsel in this case. While their presentation was vigorous, yet it was courteous at all times and the matter certainly was fully before the Court.

The Ordinance of the City of Toledo reads as follows:

"ORD. 167-56 Repealing Section 25-9-1, Article IX, Chapter 25, Toledo Municipal Code as presently written, enacting a new Section 25-9-1, Article IX, Chapter 25 in place thereof, making it unlawful to own, possess, exhibit, operate or permit the operation or exhibition of pinball machines after July 1, 1956; providing a penalty for violation, and declaring them nuisances subject to confiscation.

Whereas, coin-operated pinball machines encourage gambling on the part of minors, persons unable to afford financial loss and the public generally with resultant disorders; and

Whereas, they promote profligacy, idleness and waste and serve no useful purpose; now, therefore, Be it ordained by the Council of the City of Toledo;

Section 1. That Section 25-9-1, Article IX, Chapter 25, of the Toledo Municipal Code, regulating and licensing mechanical and manually operated devices, as amended by Section 14 of Ordinance No. 128-56

passed by Council March 19, 1956, be and the same is hereby repealed.

Section 2. That a new Section 25-9-1, Article IX, Chapter 25, of the Toledo Municipal Code, be and it is hereby enacted, reading as follows:

SECTION 25-9-1

(a) It is hereby declared prejudicial to public morals and contrary to the public welfare, and is hereby made unlawful, to own, possess, exhibit, operate or permit the operation or exhibition of any pinball machine or any manually or coin or disc operated amusement device, of whatever kind or description, or by whatever name known or commonly referred to, which is so constructed as to make possible either directly or indirectly by the use of an adjustment, or by the registering of odds or a score, the return, or entitle one to the return of cash, tickets, discs, tokens, free-plays, certificates or other privileges, whether such ticket, disc, token, free-play, certificate or other privilege has a value or not.

(b) Any pinball machine or similar device described in Section 25-9-1 is hereby declared a nuisance and shall be subject to seizure by any police officer and may be destroyed by order of the Chief of Police as in the case of gambling devices. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance, to dispose of same.

(c) Whoever owns, possesses, exhibits, operates or permits the exhibition or operation of such machine shall, upon conviction, be fined not less than $50.00 nor more than $200.00, or be imprisoned for more than six months, or both. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance to dispose of same.

Section 3. This ordinance shall take effect and be in force from and after July 1, 1956.

Passed April 9, 1956.

OLLIE CZELUSTA, Mayor.

Attest: C. F. DIEFENBACH, Clerk of Council."

The Court finds that the two pinball machines in evidence in this case, and others exactly like them, so long as they are operated exactly as these two pinball machines were operated, are not violative of the Ordinance. The Court wishes to add that while at first blush the Ordinance seemed to be a banning ordinance, banning all pinball machines from the City of Toledo, that was not a fact and was so admitted by counsel for the City of Toledo and the City Manager thereof, and was simply a measure to regulate pinball machines if they were used as a gambling device.

The Court therefore dissolves the Temporary Injunction heretofore granted and grants no new Injunction, as the Court can only assume that the City of Toledo and its officers will follow the law.

Journal Entry to be prepared by Attorneys for the plaintiffs and submitted to Attorneys for the Defendants and lodged with the Court within five (5) days of the order herein.

/s/ TOM D. STAHL,

Judge.

APPENDIX B.

OPINION OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

YOUNGER, *J.* This case arises on appeal by the City of Toledo from a finding and judgment of the Court of Common Pleas of Lucas County, relative to the interpretation and legal effect of Ordinance No. 167-56, Section 25-9-1, Article IX, Chapter 25 of the Municipal Code of the City of Toledo, relating to so-called pinball machines.

Stripped of words unnecessary for our consideration, the ordinance reads as follows:

> "It is hereby declared prejudicial to public morals and contrary to the public welfare and is hereby made unlawful to own * * * any pinball machine * * * which is so constructed as to make possible * * * by the use of an adjustment or by the registering of odds or a score, the return of * * * tokens, free plays, * * * or other privileges."

The Common Pleas Court held that this ordinance was a legal and constitutional enactment by the Council and legally and constitutionally provides for the control and regulation of the ownership, possession and use of pinball machines and for their seizure when used as gambling devices. The court further found that there was no evidence introduced in the trial of the case that the two machines introduced in evidence were used as gambling devices even to the extent of giving a free play and that therefore the ownership of said machines was not violative of the ordinance.

It is admitted that the machines introduced in evidence, as originally constructed did provide for free plays and that such machines are necessarily quite complicated in their construction. The evidence shows that the ma-

chines introduced in evidence were altered and rearranged so that the free play feature had been eliminated, and there was a great amount of evidence introduced as to the length of time, skill and knowledge required to change the machine back so that the free play feature would again work. It is claimed on one hand that it would take a day or so for an ordinary mechanic to change the machines from no free play to free play or to reactivate the machines. On the other hand, it is claimed an expert pinball mechanic could reactivate the machines in a matter of minutes.

However, our decision in this case cannot be controlled by the length of time necessary to reactivate the machines. The evidence introduced shows plainly that the machines in question can be reactivated, and whether an ordinary mechanic requires several days or an expert only fifteen minutes to do the trick, is beside the point. These machines do register odds or a score and can be adjusted to provide free plays or other privileges.

Since the constitutionality of the ordinance is not under attack in this Court, we are not called upon to review the recent cases on that subject. That has been well done by Judge Fess of the Sixth Appellate District, sitting by assignment in the Second District, in the *Benjamin* and *Ferguson* cases against Columbus. These cases are as yet unreported, but all counsel in the instant case are familiar with the opinion, and this Court has been furnished with a copy.

It is fundamental in cases of this nature that the court cannot substitute its judgment for that of the council which enacted this ordinance. The necessity for and wisdom of the ordinance is a matter which has been determined by the Council of the City of Toledo and an ordinance can

not be overthrown by a court unless such legislation is clearly arbitrary, unreasonable or unrelated to the public health, morals, safety or welfare of the community.

Our conclusion, therefore, is that so much of the judgment of the Court of Common Pleas as holds that the ownership of the pinball machines introduced in evidence is not violative of the ordinance will be reversed, and since the record fails to show the plaintiffs to be entitled to the relief prayed for, their petition will be dismissed and final judgment entered for the defendant city.

MIDDLETON, *P. J.* and GUERNSEY, *J.*, concur.

APPENDIX C.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Decided December 18, 1957.)

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J. ZIMMERMAN, STEWART, BELL, TAFT, MATTHIAS and HERBERT, JJ., concur.

APPENDIX D.

PARAGRAPHS 16 AND 17 OF THE SECOND AMENDED PETITION.

16. Pleading further plaintiffs say that the valuable property and property rights hereinbefore set forth have been built up by said plaintiffs over a period of years thro:gh licensing and encouragement by said defendant, The City of Toledo; that said defendant has thereby recognized that the ownership and operation of said games is a lawful and legitimate business; that said games are not and have not been used for gambling; that in passing said Ordinance the Council of said City is now attempting to deprive these plaintiffs of said property and property rights as well as the right to carry on a lawful and legitimate business, without due process of law and in contravention of Article I, Sections 1 and 16 of the Constitution of the State of Ohio, and the 14th Amendment to the Constitution of the United States.

17. Pleading further plaintiffs say that it is the declared intention of the defendants individually and/or collectively to arrest and prosecute these plaintiffs and said merchants under said Ordinance, and seize, confiscate and destroy said games because they declare said Ordinance prohibits the ownership, possession, exhibition, operation, or the permitting of anyone to operate any pinball machine or any manually or coin or disc-operated amusement device, of whatever kind and description, or by whatever name known or commonly referred to, which is so constructed as to make possible either directly or indirectly by the use of an adjustment, or by the registering of odds or a score, even though they do not return, or entitle one to the return of cash, tickets, discs, tokens, free-plays, certificates or other privileges, whether

such ticket, disc, token, free-play, certificate or other privilege has a value or not; that there are many table games or devices, the use, play or operation of which is controlled by placing therein a coin or disc, which are manually operated, but that the ownership, custody, control or operation of said games or devices is not prohibited by said Ordinance; that while the preamble to said Ordinance declares that coin-operated pinball machines encourage gambling, it fails to differentiate between games of skill, those of chance and those giving awards; that while the pin games operated by said plaintiffs do not constitute a nuisance and do not promote profligacy, idleness or waste and do not constitute a nuisance, there are other games or places the operation of which is not prohibited by said Ordinance which do promote profligacy, idleness and waste; that said discrimination in the terms of said Ordinance as well as in the enforcement thereof by said defendants amounts to a denial to the plaintiffs of the equal protection of the law within the meaning of Article I, Section 1, of the Constitution of the State of Ohio and of the 14th Amendment to the Constitution of the United States. See Plaintiff's Exhibits C, D, E and F attached hereto and made a part hereof.

APPENDIX E.

NO. 18 OF ASSIGNMENTS OF ERROR FILED IN THE SUPREME COURT OF OHIO.

(18) That the Court of Appeals erred in holding that Ordinance No. 167-56 is not in contravention of the State or Federal Constitutions.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 902.

DON O. FEAK, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, *et al.*,
Respondents.

RESPONDENTS' BRIEF

Directed to Petition for Writ of Certiorari to The Supreme Court of Ohio.

CHARLES T. LAWTON,
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CITY OF TOLEDO, *et al.*,

Respondents.

RESPONDENTS' BRIEF

Directed to Petition for Writ of Certiorari to The Supreme Court of Ohio.

JURISDICTION.

The Supreme Court of Ohio denied the petitioners' motion to certify the record in this case for hearing on its merits. Said denial constituted a final order of the Supreme Court of Ohio and, in effect, sustained the judgment of the Court of Appeals of Ohio.

The trial court denied the petitioners' petition to exercise its equitable powers to enjoin the respondents from enforcing the legally enacted ordinance making it a crime for anyone to own, possess, exhibit, operate or permit the exhibition or operation of any coin operated amusement device of whatever kind or description, which is so constructed as to make possible either directly or indirectly by the use of an adjustment, to award anything of value, including a free play on said device. (See ordinance marked Appendix A.)

CONSTITUTIONAL QUESTION.

The constitutional question presented is whether the courts of Ohio have violated the petitioners' constitutional rights in that said courts have refused to exercise their equitable powers to enjoin the enforcement of a criminal law.

STATEMENT OF THE CASE.

For some time prior to 1936, pinball machine operators put in play, in various sections of the City of Toledo, mechanical devices known as pinball machines which were operated as gambling mechanisms. In order to control the placing and use of said machines, and to eliminate the gambling aspects thereof, the Council of the City of Toledo, on or about July 9, 1936, passed an ordinance licensing the so-called pinball machines. From time to time since the original ordinance, it became necessary, in the judgment of the City Council, to pass additional restrictive amendments thereto. On April 9, 1956, it became obvious to the Council of the City of Toledo that licensing said machines failed to control their operation and use as gambling devices. City Council, therefore, on said date repealed all licensing ordinances and passed in lieu thereof, a new ordinance which is incorporated in the municipal code of the City of Toledo as Article IX, Section 25-9-1. Said ordinance made it a misdemeanor for anyone to own, possess, exhibit, operate or permit the operation or exhibition of any manual or coin or disc operated amusement device of whatever kind or description by whatever name known or commonly referred to which is so constructed as to make possible either directly or indirectly or *by the use of an adjustment* or by the registering of odds or a score, the return, or entitle one to the return of cash, tickets, discs, tokens, free plays, certificates or other privileges, whether

said ticket, disc, token, free play, certificate or other privilege has a value or not. (See ordinance marked Appendix A.)

The petitioners brought an action in the Court of Common Pleas, Lucas County, Ohio, praying that the respondents, as agents for the enforcement of said ordinance be enjoined from enforcing said ordinance.

Upon the trial of said cause, a temporary injunction previously issued by the trial court, was set aside and the prayer for a permanent injunction was denied, the trial court finding, however, that the machines such as described in the ordinance and introduced in evidence, were not gambling devices per se and were not in violation of the City ordinance. (See Appendix B.)

Upon appeal, the Court of Appeals of Lucas County, Ohio, held that the trial court should be affirmed in its judgment refusing to enjoin the enforcement of the ordinance, and held further that the trial court was in error in its finding that the machines which were introduced in evidence by the petitioners, were not in violation of the ordinance. (See Appendices C and D.)

Upon appeal to the Supreme Court of Ohio, the said court of last resort in the State of Ohio refused to review the decision of the Court of Appeals and affirmed its decision on an application for rehearing thereof. (See Appendix E.)

ARGUMENT.

We submit that the constitutional rights of the petitioners have not been violated in that the courts of Ohio have refused to exercise their equitable powers to enjoin the enforcement of a criminal law.

CONCLUSION.

We respectfully submit that the respondents' petition for a writ of certiorari directed to the Supreme Court of Ohio, should be denied and dismissed.

Respectfully submitted,

CHARLES T. LAWTON, *Director of Law*,
BY WILLIAM D. DRISCOLL,
Assistant Director of Law,
Attorneys for Respondents.

APPENDIX A.

ORDINANCE, ARTICLE IX, SECTION 25-9-1.

ARTICLE IX.

MECHANICAL AND MANUALLY OPERATED AMUSEMENT DEVICES.

SECTION 25-9-1. Mechanical Amusement Devices.

(a) It is hereby declared prejudicial to public morals and contrary to the public welfare, and is hereby made unlawful, to own, possess, exhibit, operate or permit the operation or exhibition of any pinball machine or any manually or coin or disc operated amusement device, of whatever kind or description, or by whatever name known or commonly referred to, which is so constructed as to make possible either directly or indirectly by the use of an adjustment, or by the registering of odds or a score, the return, or entitle one to the return of cash, tickets, discs, tokens, free-plays, certificates or other privileges, whether such ticket, disc, token, free-play, certificate or other privilege has a value or not.

(b) Any pinball machine or similar device described in Section 25-9-1 is hereby declared a nuisance and shall be subject to seizure by any police officer and may be destroyed by order of the Chief of Police as in the case of gambling devices. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance, to dispose of same.

(c) Whoever owns, possesses, exhibits, operates or permits the exhibition or operation of such machine shall, upon conviction, be fined not less than $50.00 nor more than $200.00, or be imprisoned not more than six months,

or both. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance, to dispose of same. (Ord. 167-56, April 9, 1956.)

APPENDIX B.

JUDGMENT ENTRY OF THE TRIAL COURT.

This cause came on for trial of the issues joined on the amended petition and the answer thereto, and was submitted to the Court upon the evidence, the arguments and the briefs of the respective counsel.

The Court, being fully advised in the premises, finds that this action is for a declaratory judgment. The prayer for injunctive relief is merely ancillary.

The Court further finds that Ordinance No. 167-56, Section 25-9-1, Article IX, Chapter 25 of the Municipal Code of the City of Toledo, is a legal and constitutional enactment by the Council of the City of Toledo.

The Court further finds that, contrary to popular belief, the provisions of said Ordinance do not ban the exhibition and use of all pinball machines in the City of Toledo.

In the course of the trial of this case, the City Manager of the City of Toledo, and, Counsel for the City of Toledo, both admitted that it was not their contention that said Ordinance ban the exhibition and use of all pinball machines in the City of Toledo.

The Court does find, however, that said Ordinance does legally and constitutionally provide for the control and regulation of the ownership, possession and use of pinball machines, and for their seizure when used as gambling devices.

The Court further finds that the two pinball machines in evidence as Plaintiffs' Exhibits "A" and "B," are not violative of the aforesaid Ordinance, as no evidence was introduced in the trial of this case that these two machines were used as gambling devices, even to the extent of giving a free-play.

It is therefore adjudged and declared that the two pinball machines in evidence as Plaintiffs' Exhibits "A" and "B," and others exactly like them, so long as they are operated exactly as these two pinball machines were operated, are not violative of Ordinance No. 167-56, Section 25-9-1, Article IX, Chapter 25 of the Municipal Code of the City of Toledo.

It is therefore ordered that the temporary injunction heretofore ordered, be and it hereby is dissolved and held for naught, and the prayer for a permanent injunction hereby is denied.

It is further ordered that the Court costs of these proceedings in the amount of $165.20 be assessed and that they be paid one-half by the plaintiffs and one-half by the defendants. Execution is allowed to issue therefor.

To the foregoing findings, declarations and orders, plaintiffs and defendants have saved their respective exceptions and the same are allowed.

TOM D. STAHL,
Judge.

APPENDIX C.

OPINION OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

YOUNGER, J. This case arises on appeal by the City of Toledo from a finding and judgment of the Court of Common Pleas of Lucas County, relative to the interpretation and legal effect of Ordinance No. 167-56, Section 25-9-1, Article IX, Chapter 25 of the Municipal Code of the City of Toledo, relating to so-called pinball machines.

Stripped of words unnecessary for our consideration, the ordinance reads as follows:

> "It is hereby declared prejudicial to public morals and contrary to the public welfare and is hereby made unlawful to own * * * any pinball machine * * * which is so constructed as to make possible * * * by the use of an adjustment or by the registering of odds or a score, the return of * * * tokens, free plays, * * * or other privileges."

The Common Pleas Court held that this ordinance was a legal and constitutional enactment by the Council and legally and constitutionally provides for the control and regulation of the ownership, possession and use of pinball machines and for their seizure when used as gambling devices. The court further found that there was no evidence introduced in the trial of the case that the two machines introduced in evidence were used as gambling devices even to the extent of giving a free play and that therefore the ownership of said machines was not violative of the ordinance.

It is admitted that the machines introduced in evidence, as originally constructed did provide for free plays and that such machines are necessarily quite complicated in their construction. The evidence shows that the ma-

chines introduced in evidence were altered and rearranged so that the free play feature had been eliminated, and there was a great amount of evidence introduced as to the length of time, skill and knowledge required to change the machine back so that the free play feature would again work. It is claimed on one hand that it would take a day or so for an ordinary mechanic to change the machines from no free play to free play or to reactivate the machines. On the other hand, it is claimed an expert pinball mechanic could reactivate the machines in a matter of minutes.

However, our decision in this case cannot be controlled by the length of time necessary to reactivate the machines. The evidence introduced shows plainly that the machines in question can be reactivated, and whether an ordinary mechanic requires several days or an expert only fifteen minutes to do the trick, is beside the point. These machines do register odds or a score and can be adjusted to provide free plays or other privileges.

Since the constitutionality of the ordinance is not under attack in this Court, we are not called upon to review the recent cases on that subject. That has been well done by Judge Fess of the Sixth Appellate District, sitting by assignment in the Second District, in the *Benjamin* and *Ferguson* cases against Columbus. These cases are as yet unreported, but all counsel in the instant case are familiar with the opinion, and this Court has been furnished with a copy.

It is fundamental in cases of this nature that the court cannot substitute its judgment for that of the council which enacted this ordinance. The necessity for and wisdom of the ordinance is a matter which has been determined by the Council of the City of Toledo and an ordinance can not be overthrown by a court unless such legislation is

clearly arbitrary, unreasonable or unrelated to the public health, morals, safety or welfare of the community.

Our conclusion, therefore, is that so much of the judgment of the Court of Common Pleas as holds that the ownership of the pinball machines introduced in evidence is not violative of the ordinance will be reversed, and since the record fails to show the plaintiffs to be entitled to the relief prayed for, their petition will be dismissed and final judgment entered for the defendant city.

MIDDLETON, *P. J.* and GUERNSEY, *J.*, concur.

APPENDIX D.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

This cause came on to be heard upon the appeal by defendants below, the City of Toledo, *et al.*, from a final order of the Common Pleas Court of Lucas County, Ohio, upon questions of law and fact and on questions of law. The court finds that defendants-appellants have abandoned their appeal upon questions of law and fact and perfected their appeal on questions of law. Said appeal on questions of law and fact is hereby dismissed.

This cause is retained as an appeal upon questions of law.

The court finds that the judgment of the Court of Common Pleas of Lucas County, Ohio, held that Ordinance No. 167-56 of the City of Toledo was a legal and constitutional enactment by the Council of the City of Toledo and was in accordance with law; that the consti-

tutionality of said ordinance was not raised by the pleadings, the assignments of error nor argued in the briefs in this case in this Court, and this Court therefore does not pass upon the same.

The court further finds that the trial court was in error in declaring that said ordinance does not ban the ownership, exhibition and use of all pinball machines in the City of Toledo which are so constructed as to make possible by use of an adjustment or by registering odds or a score, the return of tokens, freeplays or other privileges. The Court finds that the two machines in evidence and others like them are violative of said ordinance.

It is therefore ORDERED, ADJUDGED and DECREED that the portion of the judgment of the Court of Common Pleas holding that the two machines in evidence are not violative of the ordinance should be and hereby is reversed.

The court, being fully advised in the premises, finds that there is no basis for the application of plaintiffs-appellees for a rehearing, and therefore it is further ORDERED, ADJUDGED and DECREED that the application for rehearing should be and it is hereby denied.

It is further ORDERED, ADJUDGED and DECREED that the petition of the plaintiffs-appellees should be and hereby is dismissed and final judgment is entered for defendants-appellants.

Costs assessed against plaintiffs-appellees and cause remanded for execution.

To all of which plaintiffs-appellees save their exceptions.

/s/ GEORGE S. MIDDLETON,
/s/ RAYMOND A. YOUNGER,
/s/ J. THOMAS GUERNSEY,
Judges.

APPENDIX E.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO.

(Decided December 18, 1957.)

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT, MATTHIAS and HERBERT, JJ., concur.